United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1567

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DAVID BRYANT,
Defendant-Appellant.

Appeal From The United States District Court
For the Western District of New York

BRIEF FOR APPELLEE

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Issues Presented*

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The Government contends that the trial court, after a full hearing, made a proper finding that the eyewitness testimony was not tainted and properly admissible.

II. Whether the identification testimony of Stella Bynoe and Gwendolyn Walters was properly admitted.

The Government contends that these witnesses were fully competent to testify and that the trial court, after a full hearing, properly allowed the testimony.

III. Whether the false exculpatory statement of the defendant was taken in violation of his rights and should have been suppressed.

The Government contends that the defendant was fully advised of his constitutional rights and that the trial court, after a full hearing, properly admitted the statement into evidence.

IV. Whether the admission into evidence of a mug shot, taken on the date of the arrest for the very crime of which the defendant stands trial, creates an inference of prior criminal conduct.

The Government contends that no such inference was sought, created or argued by the prosecution and no error was committed.

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*This case has not previously been before this Court.

V. Whether photographs taken of the defendant a few days prior to the bank robbery should have been excluded from evidence.

The Government contends that the photographs were competent, relevant evidence and their admission into evidence did not violate the defendant's right to a fair trial.

VI. Whether the failure of the F.B.I. to preserve its rough notes after completion of its final report had the effect of denying the defendant a fair trial.

The Government contends that the notes were properly destroyed in accordance with accepted F.B.I. procedures; that their destruction was not done with any intent to compromise the rights of this defendant and that this defendant was not denied a right which rises to the level of denying him due process of law.

VII. Whether the defendant's sentence was excessive.

The Government contends that this defendant's sentence was properly imposed and well within the discretion of the trial court judge.

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Counterstatement of the Case

On November 10, 1976, David Bryant was convicted of Bank Robbery and Armed Bank Robbery. At the close of proof the trial court, John T. Elfvin, U.S.D.J., presiding, dismissed the charge of Conspiracy.

The jury in this case was selected on November 1, 1976 and was sworn for service on November 9, 1976. Approximately seventeen witnesses testified at trial, sixty-two exhibits were marked for identification and twenty-two were admitted into evidence at the trial. OnNovember 10, 1976, the jury returned its verdict.

On November 1, 1976 the trial court held a hearing without the jury, on the issue of whether to suppress the oral statement

of David Bryant. On November 9, 1976 the trial court denied the defendant's motion to suppress this oral statement.

On November 1, 1976 the trial court held a hearing, without the jury, on whether the identification testimony of witnesses, Bynoe, Walters and Quinn was tainted by improper and suggestive procedures. The trial court allowed the testimony and on November 9, 1976 witnesses Bynoe, Walters, and Quinn testified before the jury.

On November 10, 1976, a hearing was held, without the jury, to determine whether the eyewitness identification by Donna Vickers, a victim teller, was tainted such as to preclude her from making an in-court identification of the defendant. Following the hearing, the trial judge made the decision that the identification would be properly admitted before the jury.

On November 22, 1976 David Bryant was sentenced to a term of fifteen years in prison.

Counterstatement of Facts

On June 20, 1975, four black males entered the East End Office of Lincoln-First Bank-Rochester and armed with shotguns and handguns assaulted the customers and employees of that bank. During the robbery numerous threats of violence were made and weapons were pointed at various customers and employees. The four robbers left with money totaling approximately $28,010.

During the robbery a customer, Edward Flutts, noted that one of the robbers jumped up over the tellers case and that he was wearing sneakers and dark pants (Tr. 55)* Although several witnesses testified that two of the robbers vaulted into the teller's cages, it is clear from the testimony that the person

*"Tr." refers to the transcript of the trial; "Hr." refers to the transcript of the Hearings prior to trial.

wearing the sneakers spotted by witness Flutts was the same person who subsequently had a confrontation with Donna Vickers. Teller Donna Vickers first spotted this man jumping over teller's counter approximately twenty-five feet from where she was standing. She looked directly at him, and he at her, while the robber approached her, took her by the leg and pulled her some thirty-five feet until this robber told her to sit down and face the wall. (Tr. 327-333). Donna Vickers made an in-court identification of this robber as being defendant, David Bryant. (Tr. 337).

Two days prior to the bank robbery, David Bryant appeared for a television program taping and photographs of that appearance were admitted into evidence. (Tr. 254-262). Those photographs (Ex. 35 and 36) depict the defendant wearing a medium afro and show that he is wearing sneakers identical to the type worn by the robber identified by Donna Vickers.

Detective Cerretto arrested David Bryant on June 20, 1975. At the time of his arrest David Bryant was wearing sneakers identical to the ones worn by the robber identified by Donna Vickers and his hair was braided (Tr. 266-276). These sneakers were preserved as evidence and examined by the Monroe County Public Safety Laboratory.

During the bank robbery, the robbers who vaulted into the tellers' cages left sneaker-prints on the teller's counter. These prints were photographed for later comparison. (Tr. 79-83).

Harry Fraysier, the government's expert witness, testified that he compared the photographs of the sneaker prints left on the teller's counter and the sneakers taken from David Bryant at the time of his arrest. He rendered the opinion that based on his comparison the prints left at the bank were "most probably" made by the sneakers taken from Mr. Bryant. He gave a detailed explanation for this opinion (Tr. 283-315).

Douglas Quinn was shown photographs taken by the surveillance camera during the bank robbery and he identified three of the robbers. Although his testimony at trial was less than positive, he had previously given a signed statement to the F.B.I. (Ex. 22) where he positively identified one of the robbers as David Bryant. (Tr. 58-77).

This witness was not a victim and testified that he had known David Bryant for two and one-half years and had lived with him for some time. (Hr. 44-50).

Stella Bynoe and Gwendolyn Walters were shown surveillance photographs of the bank robbery and they identified one of the robbers as Randy Johnson. They each further testified that the person they knew as Randy Johnson was the defendant, David Bryant (Tr. 101-110; 120-122; Hr. 52-56, 32-36). Neither of these witnesses were victims, but were people who had known David Bryant for some time.

ARGUMENT

POINT I

Identification testimony at trial was fully reviewed at a hearing, without the jury, and properly admitted into evidence against the defendant.

A. *Eyewitness Identification by Donna Vickers*

In *Simmons v. U.S.*, 390 U.S. 377 (1967), the Supreme Court held that convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Id. at 384. In making this determination, the Court is bound to examine the totality of the circumstances in each case. If the claim does not meet that standard, it must fail.

However, even where the pre-trial identification procedures have been found to be "impermissibly suggestive", subsequent in-court identifications by the witness may be admitted (a) if the primary identification was not so impermissibly suggestive as to be inadmissible as a matter of law. *Foster v. California*, 394 U.S. 440 (1969) or (b) if the court is satisfied that the subsequent identification stemmed from an original observation of the defendant rather than from the tainted procedures. *U.S. ex rel. Gonzales v. Zelker*, 477 F.2d 797 (2d Cir. 1973); *U.S. ex rel. Phipps v. Follette*, 428 F.2d 912 (2d Cir. 1970).

In the progeny of cases that followed *Simmons*, supra, the courts have detailed factors to be considered in determining whether the Government may bypass an improper identification procedure and be permitted to introduce subsequent in-court identification. *See, e.g., Neil v. Biggers*, 409 U.S. 188 (1973); *U.S. v. Reid*, 517 F.2d 953 (2nd Cir. 1975); *U.S. v. Yanishefsky*, 500 F.2d 1327 (2nd Cir. 1974); *U.S. v. Mims*, 481 F.2d 636 (2nd Cir. 1973); *U.S. ex rel. Frazier v. Henderson*, 464 F.2d 260 (2nd Cir. 1972); *U.S. ex rel. Rutherford v. Deegan*, 406 F.2d 217 (2nd Cir.), *cert. denied*, 395 U.S. 983 (1968). Among these factors are:

1. The witness' opportunity for observation.

2. The witness' incentive for observation at the time of crime.

3. The accuracy of the witness' description before the suggestive identification.

4. The witness' level of certainty.

5. The existence of other evidence tending to show that the identification was not mistaken.

When these factors are carefully weighed and the trial judge exercises his discretion in favor of allowing the in-court identification, the Appellate Court should give great weight to that

determination. This is so because he personally views the witnesses and is in a much better position to judge the credibility and certainty of the witness' testimony as it unrolls rather than relying on a cold printed record. Cf. *U.S. v. Leonard*, 524 F.2d 1076 (2nd Cir. 1975); *U.S. v. Casscles*, 489 F.2d 20 (2nd Cir. 1973).

In this case, Donna Vickers testified at a hearing as to the circumstances of each instance of pre-trial identification procedures. At this hearing she was thoroughly cross-examined by defense counsel. Most importantly, she described in detail the bank robbery; her opportunity for observing the robber and, in short, the circumstances which strongly support the fact that her observations at the time of the robbery made an indelible imprint on her mind and recollection. It is significant that her identification of the defendant held up despite rigorous cross-examination by defense counsel. Cf. *U.S. ex rel Gonzales v. Zelker*, 477 F2d 797 (2nd Cir. 1973). This is even more significant by reason that the hearing was conducted outside the presence of the jury, and, thus, defense counsel was not limited to the cautious type of cross-examination that would normally take place if the jury were present.

Following the hearing, the trial judge made specific findings regarding the reliability of Ms. Vickers' in-court identification. (Tr. 183-186; Tr. 219) and permitted the witness to testify in the presence of the jury (Tr. 327-347).

While the government contends that great weight should be given to the trial court's determination of the reliability of the witness' in-court identification, it further submits that the cold, printed record herein fully supports the reliability of the in-court identification:

1. *the witness' opportunity for observation*

Ms. Vickers does not wear glasses (Tr. 167) and the area was well lighted (Hr. 171). When she first saw the robber he was approximately 26 feet from her (Hr. 187-188) and she looked at him all the time he approached her (Hr. 170-171). When he grabbed her leg, the robber was an "arm's length away" and his face very near that of the witness (Hr. 171-172). After grabbing the witness, he pulled her some 35 feet (Hr. 191) all the time looking at her, and she at him. (Hr. 172-173). The robber wore tinted glasses, not dark glasses (Tr. 345) and at least the facial features from the nose down were not covered. (Hr. 209-210). This whole process lasted some 90 seconds. (Hr. 192).

2. *the witness' incentive for observation at the time of the crime*

Ms. Vicker's attention to the robber was first attracted by a "loud bang" (Hr. 166-167); she looked, and at first thought it was one of her regular customers (Hr. 168). This was the first time Ms. Vickers was ever robbed (Tr. 340), and she had received special training from the bank on what to do during a bank robbery. (Tr. 340). Her continued observation of the robber; her closer look at him revealed that the robber was not her regular customer, but someone else. (Hr. 168-171). The robber, who had a handgun, was talking directly to her, an arm's-length away; looking at her, and she at him, for approximately 90 seconds. (Hr. 170-173)

3. *the accuracy of witness' description before the suggestive identification*

Ms. Vickers gave a description to the F.B.I. following the bank robbery (Hr. 182-183). Since the trial record does not include a description of the same features of the defendant, this court should rely on the trial judge's determination to admit the identification. The trial judge had the opportunity to observe

the accuracy of this description by viewing the defendant in the courtroom. The witness following the bank robbery looked through mug shots for at least three hours and did not identify some other person as the perpetrator. (Hr. 175).

Although the witness failed to identify David Bryant at a Monroe County Preliminary Hearing (Hr. 176), she explained that the reason was that she could not be 100 per cent sure because the defendant had changed his features somewhat by having no hair on his face and having his hair "corn-rolled" very tightly to his head. (Hr. 176-178; Hr. 218). When shown the photo in the Monroe County Grand Jury she immediately identified the perpetrator.

4. *the witness' level of certainty*

Since this witness was obviously concerned about being 100 per cent sure at the preliminary hearing (Hr. 176-178), the fact that she made an in-court identification is some indication as to this witness' certainty. Despite rigorous cross-examination the witness adhered to the identification.

5. *other evidence tending to show the identification was not mistaken*

While this evidence obviously includes the identifications by Quinn, Bynoe and Walters, as well as the "sneaker-print" evidence, there exists even more evidence that the witness' identification was accurate and based on the observations at the bank at the time of the robbery. This evidence includes (a) the promptness of her identification at the County Grand Jury (Hr. 178) (b) if, as defense contends, Ms. Vickers suddenly remembered other descriptive features of the robber at the trial, this lends support that the image of the perpetrator was firmly in her mind and recollection (c) her ability to pick out the defendant from a spread of photos shown to her just prior to trial (Hr. 179-180) (d) the fact that she did not remember very

much about her experience before the County Grand Jury indicates that the improper procedure had little, if any, effect on her identification (Hr. 204-206) (e) the witness' own statement that she made the identification of Bryant based on her recollection of the robbery, not on the basis of a photo shown to her at any time (Hr. 181; 217-218) (f) the trial judge made this finding after a full hearing.

The government concedes that a one photo display which apparently took place at the County Grand Jury was improper. However, the record herein fully supports the finding that the in-court identification was not irreparably tainted. The appellant has taken the testimony of Ms. Vickers out of context and distorted its meaning in an effort to support his position. A fair reading of the complete testimony, in context and without exaggeration, will support the government's position that the in-court identification was properly based and not tainted to the extent that would preclude its admissibility.

B. *Identifications by witnesses Walters and Bynoe*

The thrust of the defense argument here appears to be that Special Agent Jacobson wrongfully suggested to these witnesses that the person they knew as Randy Johnson was, in fact, David Bryant. It is claimed that an investigation should have been conducted to determine if there was some other person named Randy Johnson.

While the government concedes that Jacobson did advise these witnesses of the name David Bryant, this was not done prior to their statement that the person in the surveillence photo was Randy Johnson. (Hr. 32-44; 52-61). More importantly, the witnesses testified that the defendant on trial was the person they knew as Randy Johnson (Hr. 43; 54).

This was no mistake here. Furthermore, since these witnesses were not eyewitnesses to the crime, the cases of *Simmons v. U.S.*, 390 U.S. 377 (1967), and its progeny, is totally distinguishable.

In addition, the testimony of Douglas Quinn lends support to the fact that Randy Johnson is David Bryant. In this regard, he identified the same surveillence photo as depicting David Bryant, as did Bynoe and Walters as depicting Randy Johnson (Hr. 44-52). Although this witness was less than positive at trial, it is submitted that a fair reading of the testimony will show that this was probably due to the fact that he likes the defendant very much and had to face him in open court (Tr. 76-77). This is especially true in light of Government Exhibit 22 wherein this witness gave a signed statement that he positively identified the person in the surveillence photo as David Bryant. (Tr. 58-79).

POINT II

The defendant's statement was taken under proper circumstances, reviewed by the trial judge after a full hearing, and properly admitted into evidence.

In Point II of Appellant's Brief, the appellant relies specifically on Title 18, United States Code, Section 3501 in claiming that David Bryant's false exculpatory statement should have been suppressed.

The Government contends that this section is not applicable because:

1. *The statement of the defendant was not a "confession of guilt" or a "self-incriminating Statement" and is, therefore, not a "confession" as used in Section 3501.*

Title 18, U.S.C. §3501(e) specifically defines "confession" as used in that statute. It is submitted that the exculpatory statement of this defendant does not fall within that definition. The essence of the defendant's statement was that, after viewing the surveillence photos, the person depicted looked like himself, but it couldn't be him because he was not there and had eleven people who could verify his activities on that day. (Hr. 9-12).

2. There was no unnecessary delay between arrest and arraignment because the defendant was not arrested by federal authorities. The federal detainer was not executed on Bryant until July 24, 1975 (Hr. 78).

There is no question that this defendant was arrested by the State authorities on June 20, 1975. At the time he made the exculpatory statement to the F.B.I. he was not in federal detention in any respect, but was in state custody (Hr. 31). While the defendant was not arraigned before a U.S. Magistrate until July 25, post-confession delay in arraignment is not pertinent to the determination of voluntariness of a statement. Cf. *U.S. v. McCormick*, 468 F.2d 68, *cert. denied* 410 U.S. 927 (1972). In addition, the time perimeters are determined by federal detention, not by previous state incarceration, so long as there has been no collusion between state and federal officials, *U.S. v. Davis*, 459 F.2d 167 (6th Cir. 1972). There is no claim here of any collusion between state and federal authorities.

In the case at bar, the trial court conducted a hearing, without the jury, to determine the voluntariness of the statement. (Hr. 6-32). After considering all factors, the trial judge made specific finding that the statement was voluntarily made (Tr. 5-7). It is submitted that the trial court's finding of fact on the question of voluntariness of statements must be sustained on appeal unless clearly erroneous. *U.S. v. Maxwell*, 484 F.2d 1350 (1973). The appellant has not established that the ruling was clearly erroneous.

The hearing on the voluntariness of the statement established that the defendant was allowed to read an Advise of Rights and Waive form; was asked if he understood what was on the form, and the defendant said he did not have any questions regarding the form (Hr. 7-9). The subject statement was not a result of prolonged interrogation, but merely an interview that lasted only 42 minutes. (Hr. 27). Although this defendant had been interviewed on two prior occasions, it was clear from the only

record on the subject, that when the defendant declined to answer questions, the interviews stopped. (Hr. 13-32).

It is submitted that a fair reading of the complete testimony of Special Agent Foley would show that the defendant made a voluntary statement (Hr. 6-32).

The essence of appellant's request is to have this Court exclude the statement and reverse the judgment of conviction, not because the statement was not voluntarily made, but solely because of a delay in arraignment. The government submits that Title 18, United States Code, Section 3501 was not intended to expand the protection of defendants beyond that outlined by the *McNabb-Mallory* cases. *U.S. v. Marrero*, 450 F.2d 373 (2nd Cir. 1971); *U.S. v. Ortega*, 471 F.2d 1350 (2nd Cir. 1972). Clearly, the *McNabb-Mallory* cases proscribe not the mere lapse of time, but its abuse by pertinacious and harrassing interrogation. *U.S. v. Marrero*, 450 F.2d 373 (2nd Cir. 1971). The Government contends that the facts of this case do not fall within the proscription of those rules.

POINT III

The Defendant was not denied due process.

A. *Admission of the Defendant's Mug Shot*

The appellant complains that the admission into evidence of the "mug shot" of the defendant was error. The photograph in question was taken on the day of his arrest for the very crime for which he was on trial. (Tr. 266-276; 317-327). This evidence is relevant regarding how the defendant looked on the day of his arrest. Furthermore, the change of appearance of the defendant from that depicted in Government Exhibits 35 and 36 may show a consciousness of guilt. Cf. *U.S. v. Thompson*, 261 F.2d 809 (2nd Cir. 1958) *cert. denied*, 359 U.S. 967 (1959).

It is submitted that the facts in this case are easily distinguishable from all the cases cited by the appellant. Specifically, in each case the "mug shot" was taken at a prior arrest of the defendant, and gave rise to the danger of reference to a prior criminal record. *U.S. v. Harrington*, 490 F.2d 487 (2nd Cir. 1973); *U.S. v. Calarco*, 424 F.2d 657 (2nd Cir. 1970); *Barnes v. U.S.*, 365 F.2d 509 (D.C. Cir. 1966).

In this case, since this photo was not taken at some prior arrest, there can be no valid claim that it was evidence of prior criminal character of this defendant. The jury was aware of the date and purpose for which the "mug shot" was taken. (Tr. 266-276; 317-327).

In this regard, no inference of the existence of prior crimes was sought, created or argued by the prosecution.

B. *Admission of other photographs of the Defendant*

The appellant claims that the admission of Exhibits 35 and 36 into evidence was improper. The grounds for this claim is (1) relevancy and (2) that the prejudicial effect outweighed their probative value.

The Government contends that the decision complained of is well within the discretion of the trial judge. Furthermore, the determination of these matters are best left to the wide discretion of the trial judge, who, because he personally views the witnesses and the jury, is in a much better position to judge the effect of the testimony or exhibit involved. *U.S. v. Leonard*, 524 F.2d 1076 (2nd Cir. 1975).

In this case, the trial judge held a hearing without the jury relative to Exhibit 35 and 36. (Tr. 236-254). After weighing the testimony, the trial judge denied the defendant's motion to suppress (Tr. 252-253).

In addition, these exhibits were very relevant in that they show the defendant as he looked two days before the robbery and, more importantly, they depict the defendant wearing sneakers identical to the ones taken from him on the day of his arrest and identified as the ones which left the footprints on the teller's counter during the bank robbery.

C. *Failure of F.B.I. to Preserve its Notes*

The appellant claims a violation of due process by reason that the F.B.I., in good faith and in accord with normal practice, destroyed its notes after preparation of the Form 302 summary. The appellant concedes that the notes were not destroyed for improper purposes (Appellant's Brief, p. 41). Furthermore, the appellant concedes that he did not ask that the F.B.I. produce its rough notes relative to the interview of Ms. Vickers, the eyewitness (Appellant's Brief p. 40). He did, however, ask that Special Agent Jacobson's rough notes be produced relative to his interview with witnesses Bynoe and Walters and Special Agent Foley's notes be produced regarding the interview with Bryant.

The appellant claims that the production of these notes would have been extremely useful. While the appellant can establish the theoretical purpose for such use, he is unable to demonstrate that he would have had any success in that aim. "Ay, there's the rub". W. Shakespeare, *Hamlet*, Act III, Scene 1, line 64. Obviously, the defendant, without the notes, is unable to demonstrate how he was prejudiced and, without a showing of prejudice, the defendant's claim seemingly lacks merit.

The Courts in the Ninth Circuit and the District of Columbia Circuit have specifically held that the rough notes of investigators taken during an interview of a principal witness should be retained for possible production at the discretion of the trial judge. *U.S. v. Harris*, 543 F.2d 1247 (9th Cir. Sept. 1976); *U.S. v. Harrison*, 524 F.2d 421 (D.C. Cir. Dec. 1975).

There is no such definitive holding in the Second Circuit. Instead, this Circuit has held that the mere fact of destruction with no intent to suppress evidence does not require striking the witness' testimony or granting a new trial. *U.S. v. Covello*, 410 F.2d 536 (2nd Cir.) *cert. denied*, 396 U.S. 879 (1969); *U.S. v. Jones*, 360 F.2d 92 (2nd Cir.) *cert. denied*, 385 U.S. 1012 (1967); *U.S. v. Greco*, 298 F.2d 247 (2nd Cir.) *cert. denied*, 369 U.S. 820 (1962); *U.S. v. Crosby*, 294 F.2d 928 (2nd Cir.) *cert. denied*, 368 U.S. 984 (1962); *U.S. v. Thomas*, 282 F.2d 191 (2nd Cir. 1960). In *Killian v. U.S.*, 368 U.S. 231 (1961), the Supreme Court, in remanding the case for a hearing in the district court, stated that a new trial would not result if information from agents' notes were transferred to other reports and the notes were then destroyed in good faith and in accord with normal practice. See also, *U.S. v. Terrell*, 474 F.2d 872 (2nd Cir. 1972).

While it is difficult to disagree with the well-reasoned opinions in *Harrison* and *Harris*, it is submitted that the administrative burden imposed on the government in keeping such rough notes substantially outweighs the unlikely chance that these rough notes would be helpful to the defendant. This is especially true where the investigator promptly prepares a formal report of the interview. If agents failed to prepare a formal report of an interview, the requirement would be far more reasonable.

However, in the case of investigations conducted by the F.B.I., a formal 302 is promptly prepared after each interview. In the past, it is clear that such reports have helped the defense and hurt the prosecution. *U.S. v. Harris*, 543 F.2d 1247 (9th Cir. 1976). As such, there is no evidence that the reports are intentionally or negligently altered to help the prosecution.

Furthermore, given the difference in human beings; their intelligence, memory and the many varied methods used to refresh recollection, the only effective use of rough notes would

be to require the investigator to interpret his shorthand. This would be especially true where the shorthand "note" or "key word" is sufficient to accurately refresh the recollection of the agent in preparing his report, but is seemingly different from the word that would normally be used by the witness. While imposing this requirement on agents may well make them more careful, there is no evidence that they are generally negligent in preparing their reports. In addition, this action may well prompt the establishment of uniform shorthand for all agents. While this may not seem burdensome at first blush, it is possible that accuracy may well be lost with the agent concentrating, not on what the witness says, but on how to write what words he might use to properly reflect what the witness says, and which are defined as proper and acceptable shorthand notations. In effect, the rule would create two "formal" reports: (1) the rough notes properly marked and defined and (2) the formal 302 dictated from these "rough" notes.

It seems that a better rule would be to require prompt preparation of the formal report following the interview. This rule would substantially insure the accuracy of the report prepared by agents who are generally honest and fair-minded. The formal report of the agent is likely to give sufficient ammunition for cross-examination, if there be any at all. Further, with the wealth of other information available to the defense generally, it seems that this additional requirement is repetitious and unnecessary. While it is not disputed that the courts, and properly so, have the right and power to determine what is producible under *Brady*, *Rule 16* or *Jencks*, the exercise of this function should not impose additional burdens of record-keeping on already overworked agencies where the benefit to the defendant is remote.

In this case, however, this Court need not reach that issue since no prejudice could be shown to the defendant by reason of

the failure to produce the rough notes on the interviews of Ms. Vickers or Mr. Bryant. The likelihood of prejudice regarding the failure to produce rough notes of the interviews of Bynoe and Walters, if error, is harmless.

In the case of the rough notes regarding the interview of Ms. Vickers, the appellant admits that no request for these notes was made below (Appellant's Brief, p. 40) and Special Agent Carney, who conducted the interview did not testify. In addition, the formal 302 of that interview was provided to the defendant for purposes of cross-examination of Ms. Vickers.

In the case of the rough notes of Special Agent Foley regarding his interview with Mr. Bryant, although requested, apparently would not give rise to a significant chance that the additional item, developed by skilled counsel, could have induced a reasonable doubt such as to avoid a conviction. Cf. *U.S. v. Hilton*, 521 F.2d 164 (2nd Cir. 1975); *U.S. v. Miller*, 411 F.2d 825 (2nd Cir. 1969). This is so because there is no apparent dispute that the defendant said what agent Foley claims he said. This conclusion is based on the fact that the defendant did not take the stand at the pre-trial hearing and dispute the testimony. Since he could have testified here without any risk to his rights at trial, his failure may be regarded as tantamount to an admission (for purposes of this appeal only) of the accuracy of the agent's testimony.

The failure to provide the rough notes of the interviews of Bynoe and Walters created no serious hardship for this defendant. The 302's of the interviews were provided to defendant and the defense had an opportunity to cross-examine the witnesses in detail. Since this cross-examination first took place at the hearing, the defense was not limited to the cautious type of examination that is likely when the jury is present. In addition, the witnesses had a fairly good recollection of their interview and, moreover, generally testified from their current knowledge. (Hr. 52-63; 32-44).

Finally, if error is present, and the government does not concede that there is error, it is harmless in view of the substantial evidence against this defendant.

POINT IV

The defendant's sentence was a proper exercise of the discretion of the sentencing judge.

The Appellant argues that his sentence was excessive. Since the maximum sentence possible for a conviction of armed bank robbery is 25 years, the sentence of 15 years is well within the sentencing prerogative of the judge.

The sentence imposed on the defendant was within the statutory limit. It has been uniformly held that the imposition of sentence is within the discretion of the sentencing court, if the sentence is within the statutory limit. *U.S. v. Tucker*, 404 U.S. 443 (1972).

In *U.S. v. Velazquez*, 482 F.2d 139 (2d Cir. 1973) at 142, the Court Appeals noted:

> "We are bound by prior case law to the rule that, absent reliance on improper consideration, see *U.S. v. Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman J. concurring), or materially incorrect information, see *U.S. v. Malcolm*, 432 F.2d 908, 816 (2d Cir. 1970), a sentence within the statutory limits is not reviewable."

The same principle was enunciated in *U.S. v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). In *U.S. v. McCord*, 466 F.2d 17, 18-19 (2d Cir. 1972) the court noted "that a sentence within the statutory limits is generally not subject to review," quoting *U.S. v. Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed. 2d 592, 596 (1972).

In *Tucker*, it was also pointed out that the trial court may exercise wide discretion in the imposition of sentence, and that the trial judge is "largely unlimited as to the kind of information

he may consider, or the source from which it may come." *id.* at 404 U.S. 447.

In the case at hand the trial judge neither abused his discretion in the imposition of sentence, nor based the determination of which sentence to impose on misinformation.

There is no claim of any impropriety in the sentencing of this defendant. Instead, the defendant has claimed a vast difference in this sentence as compared to those given to codefendants in this case. There is no record before this court upon which the government can base its argument against this claim. While it may be considered that appellant has opened the door by references outside the record, the government declines to engage in this practice unless requested to do so by this Court.

The appellant's argument in this regard should be summarily rejected by this Court.

POINT V

The defendant was given a full and fair trial and the evidence taken as a whole was properly admitted and substantial enough for this court to affirm the conviction.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney

By: GERALD J. HOULIHAN
Assistant United States Attorney

On the brief:
Gerald J. Houlihan

Affidavit of Service

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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

April 4, 1977

Re: United States of America vs. David Bryant

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of
Richard J. Arcara, Esq.
Gerald Houlihan Of Counsel
Attorney(s) for
Appellee
On April 4, 1977
(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

Alfred Kremer, Esq.
200 Times Square Bldg.
Rochester, New York 14614

☐ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☒ By hand delivery

.....

Sworn to before me this 4th day of April 1977

.....

Notary Public
~~Commissioner of Deeds~~